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DIGEST OF OTHER RECENT VIRGINIA DECISIONS.**Supreme Court of Appeals.**

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

NORFOLK HOSEYER & UNDERWEAR MILLS CO. v. AT&T HOSEYER CO.

Jan. 16, 1919.

[98 S. E. 43.]

1. Pleading (§ 93 (2)*)—Answer—Inconsistent Defenses—Sale.—In seller's action for buyer's failure to accept and pay for ordered goods, buyer, under Code 1904, § 3264, may plead rescission of contract by interposing plea of non assumpsit, notwithstanding special plea of recoupment, under section 3299, to recover for seller's failure to deliver under the contract.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 248, 249.]

2. Pleading (§ 94*)—Answer—Inconsistent Pleas.—In view of Code 1904, § 3264, inconsistent pleas are allowable; but each plea must be regarded as separate and distinct from every other, and the defenses under one cannot be straitened or curtailed by the existence of the other.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 248, 249.]

3. Sales (§ 379*)—Seller's Action—Pleading.—In seller's action to recover for buyer's failure to accept ordered goods, buyer may show, under plea of non assumpsit, rescission by it for seller's failure to manufacture and deliver the goods.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 46, 47.]

4. Appeal and Error (§ 1033 (1)*)—Error Favorable to Appellant.—Errors favorable to plaintiff in error are not assignable errors.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 582, 583.]

5. Sales (§ 170*)—Nonperformance by Selling within Specified Time.—Where time is of essence of sales contract, seller, after failing to perform within specified time, cannot recover for buyer's refusal to accept goods.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 13, 14.]

6. Sales (§ 389*)—Breach—Rescission—Waiver.—Party having right to rescind contract because of breach by other party may waive such right and hold other party to performance.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 14.]

7. Trial (§ 253 (10)*)—Instruction—Ignoring Evidence.—In ac-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

tion for refusal to accept ordered goods, defended on ground that seller breached contract by failure to deliver within specified time, instruction as to buyer's right to rescind upon such breach, without reference to buyer's right to waive right of rescission, was properly refusal, where there was evidence of such waiver.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 510.]

8. Sales (§ 121*)—Right to Rescind—Waiver—Effect of Waiver.—Where buyer, upon seller's nondelivery within specified time, waived right to rescind, and elected to hold seller to contract, contract was kept alive in favor of seller, as well as buyer, and neither could sue, except for breach thereafter occurring.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 14, 39.]

9. Sales (§ 121*)—Evidence—Buyer's Waiver of Right to Rescind.—Buyer, by insisting on performance, waived right to rescind contract because of seller's failure to deliver within required time.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 14, 39.]

10. Sales (§ 181 (1)*)—Action by Seller—Ability to Perform.—Seller, suing on contract which he was prevented from performing by buyer, to recover, must show, not only readiness and willingness to perform, but also ability to perform.

11. Appeal and Error (§ 1064 (1)*)—Harmless Error—Instructions.—In action for failure to accept ordered goods, instruction that buyer breached contract, if it prevented seller from performing, where seller was ready and willing to perform, though erroneous, because omitting to require finding that seller was able as well as ready and willing to perform, held not to have misled jury, in view of the evidence.

12. Sales (§ 182 (1)*)—Seller's Action—Jury Question.—Whether seller had been ready and willing to perform, and had been prevented from performing by buyer, was for jury.

13. Sales (§ 388*)—Instruction—Breach by Buyer.—In action for failure to accept ordered goods, evidence of buyer's rejection of sample conforming to contract, of seller's ability, readiness, and willingness to deliver, and of buyer's conduct excusing delivery, held to warrant instruction that buyer, by preventing seller from performing, where seller was ready, able, and willing to perform, breached contract.

14. Sales (§ 383*)—Seller's Action—Sufficiency of Evidence—Damages.—In seller's action for buyer's refusal to accept ordered goods; evidence held sufficient to enable jury to ascertain damage seller sustained.

15. Appeal and Error (§ 930 (1)*)—Review—Verdict.—Supreme Court will not set aside verdict unless, considering case as on a de-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

murrer to evidence by plaintiff in error, it is of opinion that verdict is without evidence to support it, or is plainly contrary to evidence.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 620, et seq.]

16. Sales (§ 387*)—Seller's Action—Jury Question—Abandonment of Contract.—In seller's action for buyer's failure to accept ordered goods, whether contract had been abandoned by both parties was for jury.

17. Sales (§ 127*)—Rescission—Election.—A breach of contract does not effect a rescission, without the assent of the other party.

18. Sales (§ 371*)—Action by Seller—Burden of Proof—Tender.—Seller, suing for buyer's refusal to accept ordered goods, must show that its tender had been made in good faith, with a present ability and willingness to perform, and that it had kept itself ready to perform whenever called upon by buyer during life of contract.

19. Sales (§ 176 (1)*)—Breach by Buyer—Waiver by Seller.—Seller could not recover for buyer's refusal to accept ordered goods, after having waived its rights against buyer growing out of such breach.

20. Sales (§ 175*)—Performance—Buyer's Refusal to Accept.—Where contract required seller to ship or store goods seller had agreed to manufacture for buyer, seller was relieved of such duty upon buyer's refusal to accept sample conforming to contract, for manufacture, after notice that buyer would not accept, would have been idle performance.

Error to Circuit Court of City of Norfolk.

Action by the *Ætna Hosiery Company* against the *Norfolk Hosiery & Underwear Mills Company*. Judgment for plaintiff, and defendant brings error. Affirmed.

H. W. Anderson, of Richmond, and *Tazewell Taylor*, of Norfolk, for plaintiffs in error.

R. R. Hicks, of Norfolk, for defendant in error.

PAMPLIN *v.* NORFOLK & W. RY. CO.

Jan. 16, 1919.

[98 S. E. 51.]

1. Railroads (§ 113 (1)*)—Highways—Location—Change of.—The consent of the board of supervisors, under Code 1904, § 1294b, subsec. 3, to a change of location of a public highway by a railroad com-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.